No. 8055

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation; BAKER'S BAY FISH COMPANY, a corporation, and H. J. BARBEY,

Appellants

vs

UNITED STATES OF AMERICA

Appellee

Upon Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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FOREWORD

The record in the case consists of the Printed Transcript of the record, the original transcript of the record prepared by the court reporter, which, by stipulation of counsel and order of the court, may be

referred to in the briefs and in the arguments, the original exhibits received in evidence which could not conveniently be included as parts of the printed record, and the printed transcripts of record filed in the names of the State of Oregon and the State of Washington, companion appeals herein, and which, by stipulation of counsel and order of the court, may be referred to in the briefs and in the arguments.

STATEMENT OF FACTS

This is an appeal from a decision of the United States District Court for the District of Oregon. The suit was brought in equity by the United States to obtain injunctive relief against acts of trespass and encroachment upon real property allegedly belonging to the United States, and as an incident to such relief to obtain a declaration of title.

The defendant, Columbia River Packers Association, is an Oregon corporation, and the Baker's Bay Fish Company is a corporation of the State of Washington. The two corporate defendants and the defendant, H. J. Barbey, are salmon packers and at all times herein material were engaged in the business of fishing for salmon and owning and operating salmon canneries. The three defendants were jointly engaged in the ventures out of which the controversy arose.

At p. 58 of the transcript of record will be found a map and chart of Sand Island, and circumscribed in yellow thereon is defined the area of land on which

it is alleged the trespasses occurred. The trespasses were denied, and issue was joined thereunder.

The original complaint was filed on the 15th day of August, 1934 (Tr. p. 306). Both of the local district judges felt that they were disqualified to sit in the case, and after much delay and difficulty in obtaining the services of a district judge, the Honorable C. C. Cavanah, United States District Judge for the District of Idaho, finally came to Portland and opened the trial on June 11, 1935. Decree was entered in favor of the United States on the 9th day of August, 1935, and in an eleven-page written opinion Judge Cavanah met and disposed of the points and issues raised in the case (Tr. p. 32 to 46 inc.). Appeal is instituted from this decree.

THE PLEADINGS SUMMARIZED

The complaint alleges that Sand Island is a military reservation of plaintiff, and that plaintiff is entitled to the immediate and exclusive possession thereof. The answer admits ownership by plaintiff of Sand Island, but avers that the area of sands to the south of high water mark of said Island, being the area circumscribed in yellow, is not a part of Sand Island, but rather a part of Peacock Spit and the property of the State of Washington.

The complaint next alleged that Sand Island is situate easterly and northerly of the north ship channel of the Columbia River. This allegation is denied, in

that it is claimed that the north ship channel, as a channel, has ceased to exist and that the said north ship channel which as a definitive line admittedly marks the boundry line between the States of Oregon and Washington, is situate where said Sand Island formed a union with the said bodies in the years 1932, 1933 and 1934.

It is next alleged in the bill that the sands situate on the southerly shores of Sand Island are immensely valuable as fishing and seining sites and this allegation is admitted in the answer. (Tr. 6, 16.)

It is next alleged in the bill, and admitted in the answer, that on the 27th day of May, 1930, the Secretary of War, acting for and on behalf of the United States, leased to the defendants herein, H. J. Barbey and Columbia River Packers Association, for a period of five years from and after June 1, 1930 "*the land on the south side of Sand Island,*" which lease, with its description and incidents, is set out in the case of Strandholm vs. Barbey, 145 Ore. 705; 26 Pac. (2) at p. 48, which said case was by reference incorporated in the bill and made a part thereof. (Tr. 8, 17.)

It is then alleged in the bill that the defendants occupied Sand Island under the terms of said lease for two successive seasons, to-wit: for the years 1930 and 1931, and thereupon secured cancellation of said lease and abandoned the premises; that beginning in 1932 and continuing on through the years 1933 and 1934, the defendants continued to use the identical properties

heretofore described, without payment of rentals, and that preparations for the fishing of said premises for the season 1935 had been made and that said defendants had threatened and were then threatening to enter upon and appropriate the premises for the uses of fishing and to the irreparable injury and damage of plaintiff. (Tr. 8 and 9.)

In answering this allegation, defendants admitted the occupancy of Sand Island under the terms of the lease aforesaid during the years 1930 and 1931, but alleged that in August, 1931, the premises were abandoned and that cancellation of the lease was obtained from the Secretary of War on May 1, 1932 (Tr. 18). In making further answer to the aforesaid allegation, defendants alleged that the fishing operations described in the bill were in fact conductel upon sands of what is termed "Peacock Spit," the property of the State of Washington, and it is alleged that said premises were held under lease from said state. In short, it is alleged that the area of sands situate on the southerly shores of Sand Island (the area circumscribed in yellow—Map Tr. 58) is a part of Peacock Spit and not a part of Sand Island (Tr. 18). The answer then sets forth certain data which, it is alleged, supports the conclusion that the area in dispute comprises a part of Peacock Spit. It is further alleged in this connection that the disputed area is not located within the State of Oregon and that therefore the United States District Court for the District of Oregon is without jurisdiction; that the suit involved the

determination of the boundary line between the States of Oregon and Washington, and that said states are indispensable partise to the proceeding (Tr. 19 to 26, incl.)

The bill next sets forth the size and character of the fishing operations conducted upon Sand Island in respect to the years above mentioned, and this allegation is admitted with reiteration of the claim that such operations were conducted upon Peacock Spit and not upon Sand Island.

It is next alleged that the defendants are without title or interest in and to said premises and should be restrained from occupying the same, and this allegation is denied in the answer (Tr. 9, 10, 28).

Plaintiff prayed for injunctive relief, a declaration of title, and for costs (Tr. 10).

It was stipulated at the opening of the trial that allegations of the answer of affirmative character should be deemed denied by plaintiff.

Appearance by the Attorney General of the State of Washington

On the 3d day of June, 1935, seven days prior to the commencement of the trial, a representative of the Attorney General of the State of Washington, purporting to represent the State of Washington, filed what is styled a "Motion to Intervene," unverified, in which it was stated:

"That the State of Washington is the owner of the lands which defendants now occupy and upon which said defendants operate drag seines as alleged in Paragraph IX of the amended bill of complaint, and the use and occupancy of which lands plaintiffs now seek to restrain the defendants."

It was next stated that the State of Washington had leased the said premises to the Baker's Bay Fish Company, one of the defendants herein, for a period of five years from and after the 22nd day of December, 1932, at an annual rental of $5,000, and that the defendants *"are occupying and using said premises under said lease,"* and that the State of Washington has an interest in this controversy. This motion to intervene was not accompanied by a complaint or petition in intervention, nor did the representative of the Attorney General disclose the authority under which the motion was filed. (Tr. Wash. 44, 45)

By way of a consent order, so-called, and in the absence of plaintiff's counsel, United States District Judge Fee allowed the motion, giving the State of Washington until June 8 to file its "complaint of intervention," and allowed the United States five days to move against the consent order (Tr., Wash. 46). The complaint in intervention, permitted by the terms of Judge Fee's order, was never presented or filed within the time allowed for that purpose, or at all.

On the 7th of June, 1935, plaintiff filed a motion

to set aside and vacate the order of Judge Fee, and this motion was heard and sustained by Judge Cavanah on the 11th day of June, 1935, the day the trial opened. (Tr., Wash. 49, 50, 51) At the same time the court refused to permit the representative of the Attorney General to participate in the trial (Tr., Wash. 50,51.)

Appearance by the Attorney General of the State of Oregon

On the 10th day of June, 1935, a day before the trial began, a representative of the office of Attorney General of Oregon filed with the court a motion to intervene, unverified, in which it was stated that the premises in dispute were the property of the State of Oregon and that said State claimed the right to possession thereof. This motion was not accompanied by a petition or complaint in intervention, nor was such a petition or complaint ever filed in the proceeding, or presented for filing.

The motion was denied, and the Attorney General was denied leave to participate in the trial of the case.

IMPORTANT EVIDENCE

All questions arising in the case, both of law and of fact, trace their validity or invalidity to an interpretation of the changes which have occurred in the estuary of the Columbia River by the action of the waves, winds, tides and currents. This is fundamental. Changes have taken place in the placement and displacement of sand bodies, and this court is asked to

give legal effect to these changes.

A conception, then, of what the changes are, how they came about, and what legal recognition has been accorded them in the past becomes of first and prime importance. The questions of jurisdiction, of parties, and those relating to the law of accretion may all be proximately resolved upon an accurate understanding of the physical phenomena which have brought about the changes and of what the changes actually consist.

Physical Characteristics of the Sands and Spits in the Immediate Vicinity of Sand Island and Peacock Spit.

The area of sands embraced by this controversy is assumed to have maintained a substantial identity from the time of its severance from the body of sands projecting southerly from Cape Disappointment. (P. Ex. 1, maps for 1929, et seq.) But this is only partly true. The waves and currents from the ocean have direct access across the Columbia River Bar, and the spits or sand bars are subjected to constant and frequently terrific assaults (Tr. 152). The channels and the sand bars were being constantly shuffled about, and during an occasional storm sand bars of considerable dimension would be created or destroyed. The testimony of Mr. Woodworth, who is the officer in charge of the Coast Guard Station at Cape Disappointment and who appeared in behalf of the plaintiff, is informative in this regard:

"They run from 6 feet to 12 feet. I am now referring to the breakers that break on Sand Island and the sands around Sand Island. I have been on Sand Island from time to time and have observed conditions there. The waves and tides and currents have direct access from the bar to the sands of Sand Island and the sands immediately south thereof. . . . I have noticed (breakers) on the shores of Sand Island I would judge to be from eight to ten feet, just high enough to go over the boat. The breakers during these severe storms will move the sand around and wash it in or wash it out, or flatten it down. Referring to the sand south of Sand Island, I have seen a sand washed out, and I have seen it washed in over a period of one month. Sometimes it will take a day, and sometimes it will take a week. *What I mean by a sand is this whole body of sand between Sand Island west of Cape Disappointment which are all low sands,* and the breakers go clear over . . . .

. . After one of these storms had hit the fringe of sand south of Sand Island our channel would change and we would sound to find out where the deep water was. When I say change, I mean it would fill in and at times it would be changed as to line and contour and it would alter the low water mark connoting the fringe of sands south of the island there. Some of these sands would move perhaps 100 or 200 or perhaps 300 feet at a time.

That is, a single storm might move them that much." (Tr. 152,153.)

Mr. Glasgow, a witness for plaintiff and a government engineer, who for thirteen years has made annual surveys of Sand Island and the estuary (tr. 178,) testified that the changes were not due alone to the storms:

"The channels shift from east to west; that is, the main movement in that vicinity; an easterly-westerly movement of the channel on the waters of Baker's Bay. . . . There is a large body of water there, and on the lower tides they have a tendency to wash deep channels, and then for a period of some time there will be higher tides, and they won't go to that depth, and what washed out the channel one day will build up into a sand spit maybe ten or fifteen days later, during the differences in tides. It is not always due to storm." (Tr. 172)

"I have noticed a channel shift fifty or seventy-five feet in the course of a week. I can't state any specific distance as to how far a channel may shift in a month, but in a couple of cases down there, in the course of a month, it shifted a couple of hundred feet that I know of. I am referring to the channel between Sand Island and Cape Disappointment, noted on the map as the 'Ilwaco' Channel. (North Ship Channel) In a period of six months I have seen that channel shift a thou-

> sand feet. I have seen these extensive shifts on more than one occasion but not more than once to the extent of a thousand feet or more. It is not always jumping like that. The channel is in a constant state of flux and change, and the change is more violent and drastic in the winter time than it is in the summer time.' (Tr. 173; see also 174)

For further elucidation on this subject, attention is invited to the testimony of Mr. Parker (Tr. 137); Mr. Aho (Tr. 160, 161); Mr. Brown, defense witness (Tr. 262).

It is highly debatable whether the body of sands we are concerned with maintained a recognizable identity after the year 1929. New bodies of sands were being formed constantly and other bodies were with equal consistency being washed away. It would be quite beyond the powers of human ingenuity to determine to what extent an identity was maintained. True, the area in the estuary exhibited a tendency favorable to the formation of sand deposits, but large blocks of the area would disappear over night—by the operation of mild storms and ordinary river swells—and similarly other bodies would be built up.

The North Ship Channel and Peacock Spit

Peacock Spit is first designated on the maps as such in the year 1879. (Plaintiff's Ex. 1, Map 1879). In 1895, the spit began to break up and by 1896 the sands which composed the spit disclosed a tendency to

drift easterly towards Sand Island. Curiously enough, the sands of Peacock Spit stood in the same relative position in the year 1896 as they did in 1929. (Maps for those years, Plaintiff's Ex. 1). In 1897 a body of these sands had broken off from Peacock Spit, consolidated and formed what is termed on the map "Republic Spit." As this spit made its way across the channel to form ultimate union with Sand Island in the year 1899, it caused the North Ship Channel to shoal and finally changed the course of that channel, locating it at about the same point where the North Ship Channel was located in the year 1932 (See Plaintiff's Ex. 1, maps 1932, 1899).

The movement of the sands thus broken off from Peacock Spit in the year 1896 brought about in four years a change in the location of the North Ship Channel almost identically equivalent with the change effected in the four-year period beginning in 1929. And in each instance the sands which had broken off from Peacock Spit attached themselves, by slow and imperceptible progression, onto Sand Island. What had formerly been Republic Spit ceased to exist, and thereafter those sands became part and parcel of Sand Island.

In 1908 the United States Supreme Court had before it the problem of locating the North Ship Channel as a basis for delineation of the boundary line between the States of Oregon and Washington (211 U. S. 127, Washington vs. Oregon). The Court likewise

had before it the maps noting the changes which had occurred in the North Ship Channel between the years 1896 and 1900 (See Chart "B" at p. 132 of the decision). The shift in the channel, occasioned by the action of the Republic Spit, was recognized by the Court, and the new channel was defined as the boundary between the states. And the Spit which had become attached to Sand Island, assuming that it had maintained an identity, and which had caused the shift in the channel, was recognized as an addition to and a part of Sand Island. Defendant's contention that the North Ship Channel ceased to exist in the face of such a shift is contrary to the plain implication of the decision of the United States Supreme Court above adverted to. The same is true in respect to the contention that the sands on the southerly shores of the island are still a part of Peacock Spit.

Evidence Pertaining to the Interest of the State of Washington

In the answer defendants adopted one all-inclusive theory of defense, to-wit: that the area of sands in question were located in the State of Washington; that they comprised a part of Peacock Spit, and that these defendants held the same by virtue of a lease executed by the State of Washington. The implication was, of course, that the State of Washington was claiming the premises. The hypothesis of this defense rests upon three assumptions of fact, that is (1) that the State of Washington leased the premises to defendants; (2)

that legal recognition has been accorded said leases; and (3) that the physical evidence shown by the maps forming Plaintiff's Exhibit 1 disclosed the premises to be a part of Peacock Spit. These assumptions of fact will be considered in order with relation to the record.

(1) *The contention that the State of Washington leased the premises to defendants*:

The State of Washington has not at any time leased or purported to lease the premises embraced in this proceeding. The two leases under which the claim is predicated are before the court and comprise Defendants' Exhibits No. 22 and 23. The first lease (Defendants' Exhibit No. 22) was executed on the 7th day of May, 1928, and purported to lease "Peacock Spit, lying southeasterly of the main channel range as shown *upon the United States Coast and Geodetic Survey Chart No.* 6151 *of the Columbia River.*" There can be no misconstruction of the language of the description. It referred to Peacock Spit as it existed at that time or prior thereto. Though defendants did not produce for the record the map referred to in the lease, we do have as a part of Plaintiff's Exhibit No. 1 the map for the year 1928, which shows the location of Peacock Spit, the area mentioned in the lease.

The United States has never questioned, and does not now question, the right of the State of Washington to lease the premises described in the lease. It is undisputed in the record that the State of Washington

has leased Peacock Spit for a great many years and that fishing sites on Peacock Spit are valuable as seining sites, but the lease by express terms does not mention, either directly or by implication, that the area we are concerned with was or is a part of Peacock Spit. The seining sites on Peacock Spit, on which fishing operations were carried on by appellants under the lease from the State of Washington, are situate some two miles distant from the location we are here concerned with. (Tr. 225, 276, 277) The same thought is applied with reference to the lease, Defendants' Exhibit No. 23 The description of the lands named in the lease is identical with that of Exhibit No. 22, and only purports to lease Peacock Spit as located on the map of 1928, or the maps of prior years, and no representation or claim of ownership is avowed as respects the body of sands which formed the union with Sand Island in the years 1930 and 1931.

(2) *The contention that legal recognition has been accorded the leases to Peacock Spit*:

This is true. Both, the brief of appellants and the answer, contain citations of cases wherein the leases above-mentioned have been discussed by the courts, including this court, but such cases are confined to the terms of the leases heretofore discussed and simply affirm what has not been denied by anybody—that the State of Washington has validly leased Peacock Spit from time to time for seining purposes. The cases affirm the description mentioned in the leases and are

strictly confined in the scope of their application to the body of sands styled as Peacock Spit as it existed at or prior to the year, 1928, the time the description of the two leases was prepared.

The sands with which these litigations are involved admittedly did not assume their present entity until some years after the descriptions contained in the leases had been composed.

The cases mentioned by counsel are as follows:

Williams Fishing Co. vs. Savage as Commissioner of Public Lands of the State of Washington, 152 Wn. 165; 277 Pac. 459

Pacific Savings & Loan vs. Savage, 155 Wn. 44; 248 Pac. 744.

Williams Fishing Co. vs. Savage, 164 Wn. 44; 248 Pac. 744

Opinions of the Attorney General. Vol. 34, pp. 435, 436

United States as trustees, etc. vs. McGowan; United States vs. Bakers' Bay Fish Co., et al, 2 Fed. Sup. 426

Same case, 62 Fed. (2) 955 (9th)

Same case, 290 U. S. 592

The record affirmatively shows that the defendants have not taken seriously the claim that the premises here in dispute are a part of Peacock Spit

and that they are embraced within the description of the two leases above adverted to. As late as 1934, when the United States offered fishing sites on Sand Island for lease, which all will agree included the premises here in dispute since they are the only available sites on the Island, the defendants entered their bid for lease of the premises just as they had for many previous years (Tr. p. 186, 187, 188) Then again, just prior to the beginning of the trial in this case, we find Mr. Bowerman, of counsel for the defendant, Columbia River Packers Association, appearing before the Board of Control of the State of Oregon, urging that the State of Oregon offer these identical premises for lease. (Tr. p. 202).

These three inconsistent positions taken by defendants are established by undisputed testimony in the record. No attempt was made to refute the facts thus established. Judge Cavanah commented on this phase of the evidence in his opinion, as follows:

> "From their actions they seemed to be somewhat in doubt as to just where these disputed sites are located for they were content in accepting, first, a lease from the United States stating that they were in the State of Oregon and owned by the United States, second, that in their lease with the State of Washington the sites were located in that state, and third, that they are now interested in the action of the State Land Board of Oregon in leasing them as being in the State of Oregon. But

however inconsistent the position of the defendants may be in that respect, the conclusion is reached under the evidence that the disputed fishing sites as described in the complaint are accretions to Sand Island and they and the adjacent tide and shore lands up to high water line are located within the state of Oregon and are owned by the United States. . . " (Tr. 39)

(3) *The contention that the physical evidence contained in the maps (Plaintiff's Exhibit No.* 1) *show the premises to be a part of Peacock Spit*:

The maps speak for themselves on this point. Particular attention is invited to the maps from 1929 to 1934, inclusive; the map for the year 1935 (Plaintiff's Exhibit No. 5), and the maps for the years 1896 to 1900, inclusive. This feature of the question has been heretofore discussed in some detail—ante p.

Evidence pertaining to an alleged interest in the properties claimed by the State of Oregon.

It was not contended in the pleadings that the State of Oregon owned or claimed an interest in the properties here in dispute. The fact of the matter is that Appellants affirmatively pleaded that the State of Oregon neither held *nor claimed* such an interest. The allegation is contained in the amended answer in the following language:

> "At no time since Oregon was admitted to the Union has it claimed that said premises or any part thereof were within the State of Oregon or exercised or claimed the right to exercise any jurisdiction over it."

In the face of the issue thus joined, still it is suggested that the State of Oregon does claim an interest.

It is true that in the years 1928 and 1929 the State of Oregon laid claim to a body of sands situate in the mid-Columbia region and that question arose between the States of Oregon and Washington over title thereto. (Tr. 230). But the record likewise shows that this claim of both the respective States was promptly abandoned and never reasserted. Probably this was for the reason that the body of sands had been quite completely washed away by the year 1929. See maps, 1928, 1929, 1934 (area circumscribed by red line), P's exhibit 1. Certainly the claim made at that time would be without application to the body of sands which assumed its present entity on or about the years 1930 or 1931. And it is significant in this regard that when the premises were leased by the United States to these appellants for a period of five years, beginning with the year 1930, no protest or objection is found to have been made by either of the States. No protest was registered upon the occupancy of said premises under said lease for the years 1930 and 1931.

At pages 13, 15, 17 and 18 of Appellants' Brief, reference is made to testimony "introduced by Ap-

pellee" with respect to alleged claims of the State of Oregon. Counsel neglected to note that this testimony was given by Mr. A. E. Clark, of counsel for Appellants' and that it was of purely voluntary character, injected into the record by Mr. Clark when he was being questioned with respect to the fishing operations contemplated by his Packing Companies.

It may be urged that the attempts to intervene made by the Attorneys General of Oregon and Washington on the eve of the trial are evidence that the respective states do claim title to the premises. Complaint in the case was filed on the 15th day of August, 1934, and not until the 3d day of June, 1935, a few days before the trial began, did the Attorney General of the State of Washington file the motion to intervene. A similar motion was filed by the Attorney General of the State of Oregon on the morning before the trial opened. The motions were not accompanied by petitions or complaints in intervention, nor were such documents ever filed. The claims arose simply upon the unverified statements of the representatives of the Attorneys General that the said states were asserting a claim of title. We are not permitted to know the bases of the claims, since no pleadings were ever proffered. Though the State of Washington was given until June 8 to file its complaint in intervention, no such complaint was filed or presented for filing.

The legal effect of these appearances by the Attorneys General is discussed, beginning at page 38 of

this brief. It will there appear that what purported to be appearances by the States were simply appearances by the Attorneys General, who were without authority to enter such appearances or to in other manner bind the respective States.

The threats of continuing trespass

It is admitted by appellants that the disputed area was occupied by them during the years 1932, 1933 and 1934. (Tr. p. 118). This was after Appellants' lease of the premises from the United States had been cancelled by appellee in 1932.

On the 22d day of December, 1932, one of the appellants, Bakers' Bay Fish Company, obtained a lease from the State of Washington to Peacock Spit, and this lease contained the same description found in the earlier leases from the State, heretofore discussed at page 15 & 16 of this brief. This last named lease was to run for a period of five years from the 22d day of December, 1932 (Tr. 294). A one-half interest in the lease was assigned to appellee, Columbia River Packers Association (Tr. 297). Under this lease defendants had claimed and were claiming the right to occupancy of the disputed area during the years 1932, 1933 and 1934, and were claiming such right of occupancy under the lease at the time of the trial in 1935 (Tr. p. 204).

The lease was not limited by its terms to the use of the premises for drag seining. It was simply a blanket lease without restrictions as to use. At the fall elec-

tion in 1934 the people of the State of Washington passed initiative law No. 77, (Chap. 1, Laws of Washington 1935), and Section 6 thereof prohibited the use of drag seines. The contitutionality of the Act was argued before the Supreme Court of the State of Washington some weeks prior to the trial (Tr. 204), and the Act was declared constitutional in the case of State Ex Rel Campbell vs. Case, 47 Pac. (2) 44.

Promptly thereafter the defendants sought to circumvent the operation of the above statute by taking the position that the sands in dispute did not form a part of Peacock Spit, but rather were an independent body of sands and the property of the State of Oregon. For the purpose of this claim the sands were styled as "Oregon Sands." Thereupon the defendants applied to the State Land Board of the State of Oregon and requested that the said Board offer for lease a large part of the area of sands here in dispute (Tr. 201, 202, and Plaintiff's Exhibit No. 1, Map of 1934, area circumscribed by red line). The Board did not offer the sands, or any part of them, for lease, but a hearing was had on the application made by defendants. Meanwhile the defendants obtained licenses for fishing the premises—these from the Master Fish Warden of Oregon (Tr. 207).

Counsel for appellant Barbey, Mr. A. E. Clark, admitted very frankly that he and Mr. Bowerman, co-counsel, were extending their best efforts to obtain some kind of color of authority under which occupa-

tion of the premises for drag seining purposes could go forward. The defendant companies had succeeded in occupying the fishing locations on Sand Island previously, from about the year 1922 up to and including the year 1934 (Tr. p. 99) the last three years without a lease from the United States and the assumption is not unwarranted that their efforts in this last instance would be as successful as they had formerly been.

At page 198 of the transcript appears the following:

"(Questions by Mr. Hicks —Testimony of A. E. Clark, of counsel for defendant, Barby)

Q. Just a moment please. And do you recall at that time whether or not I stated to you that if such an operation was not contemplated this case might, under instructions from Washington from the Attorney General, be continued, and didn't I ask you to ascertain that fact —that is, whether an operation was contemplated and to let me know, and upon that decision the case would be set down for hearing or not as the facts might show.

A. That is part of the conversation that occurred." (See Tr. 198, et seq.)

The case promply proceeded to trial, evidencing the grave apprehension of the United States that the trespassing would forthwith continue as it had during the years preceding.

It is interesting to observe in this connection that Mr. Clark, of counsel for the appellant packing comp-

anies, was very anxious to have the briefs filed with the trial court within a period not later than three weeks after conclusion of the trial, because it was anticipated that appellants would in all probability desire to resume fishing. As Mr. Clark frankly stated it, "We may want to fish down there." (See typewritten transcript of record, pa. 487.)

Under these facts, coupled with the other evidence in the record, Judge Cavanah found that the threats and the occupancy, such as they were, were adequate to warrant the issuance of the injunction.

Miscellaneous Points of Evidence

Reference is made at several junctures in the brief of Appellants to the original complaint filed in the proceeding wherein it was alleged that the Defendants "fraudulently entered into pretended lease with the State of Washington," etc., of the properties here in dispute. (App. Brief, p. 7.) From this allegation, counsel emphasizes that the United States knew all the time that the State of Washington was claiming the premises. While we do not deem it material whether the State claimed the properties or not, a correction should be noted with respect to counsel's conclusion. The fact is quite to the contrary, as evidenced by the fact that an amended complaint was promptly filed, striking out this allegation. The fact is that the Appellee knew that such a claim was being asserted by the Appellants, and assumed that the lease from the State

of Washington described the premises in controversy. Upon learning that the description referred only to Peacock Spit, as it existed in 1928 and during prior years, the amendment was made in the interest of a correct allegation of the facts as we understood them to be.

It is suggested on pages 30 and 31 of Appellants' Brief that the fishing operations conducted by Appellants during the years 1932, 1933 and 1934 were not on the premises described in the lease obtained by them in the year 1930 and which was to run for a period of five years. (P.'s exhibit 3, Tr. 100.) This is simply a reiteration of the claim that these properties are a part of Peacock Spit, and therefore simply begs the entire question in respect to the ownership of the properties. Such a conclusion is not helpful. The premises covered by the lease of 1930, supra, are charted and discussed in the case of *Strandholm v. Barbey*, 145 Oregon 427, 26 Pac. (2) 46, which case was by reference incorporated in the Second Amended Complaint, and the court's attention is invited to that case for a delineation of the properties described in the lease last above referred to.

Testimony was received in the record to the effect that the southerly shore of Sand Island had progressed northerly after the year 1928 and that the area of sands we are here concerned with had built up by accretion to form the contact with Sand Island. A Mr. McLean was called by appellants to establish this proposition,

and his testimony on this point is recorded at pp. 227 and 228 of the transcript. The device chosen by the witness to find a recession northerly of the southerly shore line of Sand Island to a distance of some thousands of feet is interesting, but conspicuous for its absurdity.

The court may make the calculation very easily by reference to the maps for the years 1928 to 1934, inclusive. The southerly shore line of Sand Island, *in respect to its location with reference to the sands in question,* was built out southerly during this period rather than northerly as testified by the witness. This deduction may be readily confirmed by reference to the maps for the years 1928 to 1934, inclusive. By taking a location point at the cross marking latitude 46° 16′, where it intersects longitude 124° 2′ on the maps for those years, and drawing a line at right angles to the southerly shore of Sand Island, it will be readily observed that the shore line of said island was actually built up southerly during those years. Though the calculation is not deemed to be important, in view of the grant of Sand Island to low water mark and thereby of the sands which occupy such area, the court's attention is directed to the matter as an aid to clarification of the record.

The aero photographs of the island and adjacent sands, comprising Defendants' Exhibits No. 6, 15, 17, and 18, and Plaintiff's Exhibits No. 29, 30, and 31, are interesting and will, perhaps, be helpful to the court.

It is to be recollected that these photographs were taken at extremely low tide and that at high tide the entire area southerly of the high water mark of Sand Island was quite completely submerged.

POINTS AND AUTHORITIES

I

All intendments are resolved in favor of the ruling of the trial court in the absence of obvious and manifest error. Scope of the review.

Gila Water Co. vs. International Finance Corp. et al., (CCA 9) 13 F. (2d) 1.

Easton vs. Brant et al., (CCA 9) 19 F. (2) 857,859.

Graff vs. Town of Seward, Alaska, (CCA 9) 20 F. (2) 816.

Idaho Min. & Mil. Co. vs. Davis, (CCA 9) 123 F. 396.

O'Brien, Manual of Federal Appellate Procedure, p. 58 (Ed. 1929) and cases cited.

1934 Cum. Sup. to O'Brien's Manual of Federal Appellate Procedure, p. 54 and cases cited.

Conqueror Trust Co vs. Fidelity & Deposit Co. of Md., (CCA 8)63 F. (2d) 833, 837

II

The United States District Court for the District

of Oregon did not err in denying the motions of the States of Oregon and Washington, respectively, for leave to intervene.

(a) Neither the State of Oregon nor the State of Washington has consented to become a party, and intervention may not be allowed in the absence of such consent.

Constitution of the State of Wash., Remington Comp. Code, 1932, Vol. 1, p. 404.

O'Connor vs. Slaker, 22 F. (2) 147.

United Trucking Co. vs. Duby, 134 Ore. 1; 292 Pac. 309.

59 C. J. 323, Sec. 481.

(b) The motions to intervene, respectively, being the only documents filed by the said states, do not state facts sufficient to warrant intervention.

Toler vs. East Tennessee V. & G. R. Co., 67 F. 174, 175.

Simkins Federal Practice, Secs. 717, 718, 719, pp. 676, 677 (Ed. 1934).

Powell vs. Leicester Mills, 92 F. 115, 116.

Clark vs. Eureka County Bank (Steinmetz et al intervening), 116 F. 534, 536 (D. C. Nev. 1902).

(c) The allowance of intervention by the Attorneys General, respectively, would have been in contra-

vention of Equity Rule No. 37.

Hughes Federal Practice, Vol. 1, *Sec.* 64, p. 51 (Ed. 1931)

Evansville and H. Traction Co. vs. Henderson Bridge Co., 134 F. 973

Weber Show Case and Fixture Co. vs. Waugh, 42 F. (2) 515 (D. C. Wash.)

Equity Rule No. 37.

King vs. Barr et al., 262 F. 56 (CCA 9); Cert. denied 253 U. S. 484; 64 L. Ed. 1025; 40 Sup. Ct. 481.

Union Trust Co. of Pittsburg, Pa., vs. Jones et al., 16 F. (2) 236 (4th).

State of North Carolina vs. Southern Railway Co., (CCA 4), 30 F. (2) 204.

(d) The allowance of the motions to intervene, respectively, was within the sound discretion of the court.

Equity Rule No. 37.

Board of Drainage Commissioners vs. Lafayette South Side Bank, 27 F. (2) 286, 293 (CCA 4).

United Sattes vs. Ladley, 51 F. (2) 756.

III

The Trial Court exercised its discretion under Equity Rule No. 37 in denying the application of the Attorneys General for leave to intervene.

IV

Neither the State of Oregon nor the State of Washington is an indispensable party to this suit.

(a) Affirmative discussion.

Equity Rule 39.

Sec. 111, T. 28, U. S. C. A.

Williams vs. United States, 138 U. S. 514, 516.

Hughes Federal Practice, Vol. 5, Sec. 3045, pp. 226, 227.

United States vs. Minnesota, (1926) 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539.

United States vs. Lee, 106 U. S. 196, 1 Sup. Ct. 240.

United States vs. Peters, 9 U. S. (Cranch), 115, 139.

Rose vs. Sanders et al., same vs. Calaveras Water Users Assn., 69 F. (2) 339 (Feb. 28, 1934).

Payne vs. Hook, 7 Wall (74 U. S.) 425, 431; 19 L. Ed. 260.

Williams vs. Crabb, 117 F. 193 (CCA 7, 1902); Cert. denied 187 U. S. 645.

O'Connor vs. Slaker, 22 F. (2) 147 (8th).

(b) Cases in support of appellants' contention discussed.

California vs. Southern Pacific Co., 157 U. S. 229, 39 L. Ed. 383.

Texas vs. Interstate Com. Com., 258 U. S. 158, 163; *Penna. vs. W. Virginia,* 262 U.S. 553, 617.

New Mexico vs. Lane et al., 243 U. S. 52, 61 L. Ed. 588.

Chicago, M., St. P. & P. Railroad Co. vs. Adams Co., 72 F. (2) 816.

Skeen vs. Lynch, 48 F. (2) 1044.

United States vs. Ladley, 51 F. (2) 756.

Equity Rule 37.

V

The shift in the North Ship Channel between the years 1929 and 1934 did not constitute an avulsion.

Washington vs Oregon, 211 U. S. 127

Washington vs. Oregon, 214 U. S. 205, 215

VI

The United States is the owner in fee simple of Sand Island and the tide flats which form its southern shore.

(a) General Statement of contentions advanced by appellants and respondent in support of their respective claims.

(b) The question poised.

(c) Discussion of cases cited by appellants in support of their contention.

Holman vs. Hodges, 112 Iowa 714, 84 N.W. 950, 58 L. R. A. 673.

Bouchard vs. Abramson, 118 Pac. 233, 160 Cal. 792.

Fowler vs. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162.

People vs. Warner, 116 Mich. 228, 239; 74 N. W. 705.

(d) Affirmative presentation of the rule applicable to the facts.

McBride vs. Steinweden, 72 Kans. 508, 83 Pac. 822 (1906).

Cyrus Webber vs. J. A. Axtell, 94 Minn. 375, 102 N. W. 915.

King vs. Young, 76 Maine 76, 49 A. Reps. 596.

Mulry vs. Norton, 100 N. U. 424, 3 N. E. 581.

Waring vs. Stetcomb, (Md. 1923) 119 Atl. 336.

(e) The properties here in dispute are the properties of the United States, by virtue of its grant from the State of Oregon.

Act of the State of Oregon granting Sand Island to the United States, Tr. p. 6.

Fellman vs. Tidewater Mill Co., 78 Ore. 1, 7; 152

Pac. 268.

Taylor Sands Fishing Co. vs. Benson, 56 Ore. 157; 108 Pac. 126.

VanDusen Investment Co. vs. Western Fishing Co., 63 Ore. 7, 124 Pac. 677, 126 Pac. 604.

Armstrong vs. Pincas, 81 Ore. 156, 158 Pac. 662.

State vs. Imlah, 135 Ore. 66, 294 Pac. 1046 (1931).

Shively vs. Bowlby, 152 U. S. 1, 38, 39.

Strandholm vs. Barbey, 145 Ore. 427, 439; 26 Pac. (2) 46.

Columbia River Packers Assn.vs.United States, 29 F. (2) 91.

Moore vs. Willamette Transportation Co., 7 Ore. 359.

Coquille Mill & Mercantile Co. vs. Johnson, 52 Ore. 547, 555.

Weems Steamboat Co. vs. Peoples Steamboat Co., 214 U. S. 345, 53 L. Ed. 1028.

Cook vs. Dabney, 70 Ore. 529, 139 Pac. 721.

ARGUMENT

Point I

All intendments are resolved in favor of the ruling of the Trial Court in the absence of ob-

vious and manifest error. Scope of the review.

Attention is briefly called to the decisions of this court which hold that the findings of the trial court, based on evidence taken in open court, will not be reviewed by an appellate court, except for plain or obvious error. *Gila Water Co. vs. International Finance Corp., et al.,* (CCA 9) 13 F. (2d) 1; *Easton vs. Brant, et al.,* (CCA 9), 19 F. (2) 857, 859; *Graff vs. Town of Seward, Alaska,* (CCA 9) 20 F. (2) 816; *Idaho Min. & Mil. Co. vs. Davis,* (CCA 9) 123 F. 396.

We understand the rule to be that the reviewing court will not weigh the evidence in support of the findings, but will only consider whether there is any substantial evidence to support the same. O'Brien, Manual of Federal Appellate Procedure, p. 58 (Ed. 1929) and cases there cited.

The findings are presumptively correct and will not be disturbed unless a serious mistake of fact appears; and where there is substantial evidence to support the findings of the trial court, it is immaterial that the appellate court might differ with the process of reasoning employed to reach the finding. 1934 Cumulative Supplement to O'Brien's Manual of Federal Appellate Procedure, p. 54, and cases there cited; *Conqueror Trust Co. vs. Fidelity & Deposit Co. of Maryland,* (CCA 8) 63 F. (2d) 833, 837.

ARGUMENT

Point II

The United States District Court for the District of Oregon did not err in denying the motions of States of Oregon and Washington, respectively, for leave to intervene.

(a)

Neither the State of Oregon nor the State of Washington has consented to become a party, and intervention may not be allowed in the absence of such consent.

The Constitution of the State of Washington provides as follows:

> "Suits against the State. The Legislature shall direct by law in what manner and in what courts a suit may be brought against the State. Article 2, Section 26, Constitution of the State of Washington, Remington Comp. Code 1932, Vol. 1, p. 404."

The State of Washington has passed no law permitting the United States District Court for the District of Oregon to adjudge any rights claimed by said State in respect to the real property allegedly belonging to said State. Of this fact the court is asked to take judicial notice. *O'Connor vs. Slaker*, 22 F. (2) 147.

The same identical situation applies with respect to the attempt made by the Attorney General of the State of Oregon to intervene in behalf of said State.

See *United Trucking Co. vs. Duby,* 134 Ore. 1, 292 Pac. 309.

Whether the appearance by the state's Attorney General for the state in a federal court amounts to a voluntary appearance by the state, so as to give the court jurisdiction of a suit against the state, depends upon the authority of the Attorney General, and neither he nor any other state officer can waive the state's immunity under the above constitutional provision in the absence of a state statute expressly authorizing it to be done, and if his appearance for the state is in excess of his power, it does not constitute a voluntary submission by the state to the jurisdiction of the court. This rule, we submit, is universally recognized. The authorities are collated and ably discussed in the case of *O'Connor vs. Slaker,* supra.

A good general statement of the rule, with numerous citations of authority, is contained in 59 C. J. 323, Sec. 481, as follows:

> "Generally a state is bound by the acts of an attorney representing it by the proper authority, to the same extent that a private litigant is bound by the acts of his attorney; but an attorney-general, or other officer properly appearing for the State, can not assent to a thing which the legislature alone has power to assent to; and *if a state has not consented to be sued, the attorney-general can not, in the absence of special and explicit authority therefor, make the state a party defendant,* or give the court jurisdiction over it, by his general appearance in an action against the state or its officers. 59 C. J. 323. An attorney-general is generally

held to derive no power, in this latter respect, from a general statute making it his duty to institute and defend suits, whenever necessary, in his opinion, to protect and secure the interests of the state. Citing numerous cases."

(b)

The motions to intervene, respectively, being the only pleadings filed by the said states, do not state facts sufficient to warrant intervention.

The only documents filed by the States, respectively, in support of the attempts at intervention were the unverified motions of the Assistant Attorneys General. The motions simply state a conclusion, *and no facts are pleaded.* (Tr. Wash. pp. 44, 45), (Tr. Ore. pp. 31, 32, 33.) Though by the court's order under date of June 3, 1935, the Attorney General of the State of Washington was given until June 8 to file a petition in intervention, no such petition or complaint was ever filed or presented for filing.

Intervention may not be accomplished in this peremptory and summary manner. The courts require pleadings and allegations of fact, duly verified, so that the trial judge and the parties already before the court may know something concerning the nature of the claim that is sought to be presented. From the pleadings that are filed the court must be able to determine (1) that there will be no delay to the plaintiff in prosecuting his suit, (2) that the pleading is reasonably sufficient to effect the purpose intended, and (3) that

it is a proper case for intervention. See *Toler vs. East Tennessee V. & G. R. Co.*, 67 F. 174, 175; Simkins Federal Practice, Secs. 717, 718, p. 676 (Ed. 1934).

Any of the parties to a suit may contest an application for intervention and have the right to have all of the grounds upon which the application is based specifically set forth. See *Powell vs. Leicester Mills,* 92 F. 115, 116; Simkins Federal Practice, Sec. 719, pp. 676, 677 (Ed. 1934).

Where there is an adequate allegation of the facts showing that petitioner is entitled to intervene, the petition must be taken the same as a complaint which fails to state facts sufficient to constitute a cause of action and an objection to its sufficiency may be taken at any time. *Clark vs. Eureka County Bank* (Steinmetz, et el., intervening), 116 F. 534, 536 (D. C. Nev. 1902).

The motions to intervene filed by the respective Attorneys General on the very eve of the trial scarcely afforded appellee opportunity to register full and complete objections. The applications were not, we submit, timely made.

(c)

The allowance of intervention by the Attorneys General, respectively, would have been in contravention of Equity Rule No. 37.

Equity Rule No. 37 provides that "any one claiming an interest in the litigation may at any time be per-

mitted to assert his right by intervention, but the intervention shall be in subordination to and in recognition of the propriety of the main proceeding."

The crux of the claim of the Attorney General the State of Washington is that the property in dispute is situate within the State of Washington and that said State is the owner thereof. We understand the rule to be that the jurisdiction of the United States District Court does not extend beyond the limits of the judicial district of which it is the District Court, to adjudicate rights with respect to real property situate without the district. Hughes Federal Practice, Vol. 1, Sec. 64, p. 51 (Ed. 1931); *Evansville & H. Traction Co. vs. Henderson Bridge Co.*, 134 F. 973; *Weber Show Case & Fixture Co. vs. Waugh*, 42 F. (2) 515 (D. C. Wash.).

If this view of the law is correct, an intervention based upon the proposition that the property is situate outside the jurisdiction of the court clearly would not fall within the limits prescribed by Equity Rule No. 37. It could not be said that that would be a recognition of the propriety of the main proceeding.

In the case of *King vs. Barr, et al.*, 262 F. 56 (CCA 9); Cert. denied 253 U. S. 484; 64 L. Ed. 1025; 40 Sup. Ct. 481, this court held that an intervener can not attack the jurisdiction of the court. We quote from the opinion:

> "An intervener can not challenge the court's jurisdiction, because if the court is without jurisdiction, the proceedings are void and without ef-

fect upon the intervener, and also because equity rule 37 provides that interventions shall be in subordination to and in recognition of the propriety of the main proceeding."

Attention is also directed to the case of *Union Trust Co. of Pittsburg, Pa., vs. Jones, et al.,* 16 F. (2) 236 (4th): We quote from the opinion, p. 239:

> "The position of the appellant, Union Trust Company, that upon intervention of the trustees under the mortgage, the proceedings should have been dismissed and that in what was done to the contrary the court was without jurisdiction, is clearly untenable. In any event, appellant itself, an intervener in the same litigation to assert its unsecured indebtedness, was not in a position to make such claim. It could not intervene and seek the aid of the court and at the same time attack and dispossess the court of its jurisdiction to proceed with the litigation in an orderly way. Equity Rule No. 37, 198 F. 28; 2 Foster's Federal Pr. 261; *Horn vs. Per Marquette Ry. Co.,* 151 Fed. 626, 633; *Cauffel vs. Lawrence,* (D. C.) 256 F. 714; *King vs. Barr,* 262 F. 56 (CCA 9th Circuit)."

See also *State of North Carolina vs. Southern Railway Co.,* (CCA 4), 30 Fed. (2) 204.

The application to intervene of the Attorney General of the State of Oregon stands in the same relative position.

(d)

The allowance of the motions to intervene, respectively, was within the sound discretion of the court.

The contention is based upon the facts noted in the record and the law applicable thereto.

Equity Rule No. 37 expressly provides that intervention shall be permitted within the sound discretion of the court. It is true that under a rare circumstance the right to intervention is absolute, but we contend that this is not such an instance.

Attention is respectfully directed to the case of *Board of Drainage Commissioners vs. Lafayette South Side Bank,* 27 F. (2) 286, 293 (CCA 4), where the court stated the rule as follows:

> "Nothing seems better settled than that an application of an intervener seeking to be admitted as a party to a pending cause is addressed to the sound discretion of the court, and where the application is denied, and such intervener left to avail himself of such rights as the law may afford him in other appropriate ways, that the order denying such application is an interlocutory, and not a final decree, and hence one from which no appeal lies. Authorities to support this position might be cited almost without number, but the following cases from the Supreme Court of the United States will be found to be especially applicable and entirely conclusive of the subject: *Connor vs. Peugh's Lessee,* 18 How. 394, 15 L. Ed. 432; *Ex Parte Cutting,* 94 U. S. 14, 24 L. Ed. 49; *Guion vs. Liverpool, etc., Ins. Co.,* 109 U. S. 173, 3 S. Ct. 108, 27 L. Ed. 895; *Credits Commutation Co. vs. U. S.,* 177 U. S. 311, 316, 317, 20 S. Ct. 636 (44 L. Ed. 782)."

For authorities showing that the right of intervention was not absolute as respects the States of Oregon and Washington, reference is made to Point IV

on the subject of indispensable parties, page 45 et seq. of this brief.

Counsel quote the case of *U. S. vs. Ladley,* 51 Fed. (2) 756, for the proposition that Judge Cavanah should have allowed the motions of the States to intervene, under the authority of his own decision previously rendered. That would appear to be a somewhat tortured conclusion. In that case the land in dispute was admittedly situate within the State of Idaho, the district in which the learned judge was sitting. What he did was simply to exercise the discretion accorded him under Equity Rule No. 37, and under the particular facts of that case, permitted the State of Idaho to intervene. No doubt the State had the requisite authority entitling it to intervene, and no doubt the said State had presented a petition or complaint in intervention, with a prayer for relief, etc., to the end that the court could pass intelligently upon the question. As we have shown, the facts relating to the attempted interventions here at issue, are at wide variance with those before the court in the Ladley case. We do not contend that under a proper circumstasce a State may not be joined as a party in the Federal District Courts without thereby depriving such courts of jurisdiction. The rule, as counsel have shown, is quite definitely stablished to the contrary.

ARGUMENT

Point III

The trial Court exercised its discretion under Equity Rule No. 37 in denying the application of the Attorneys General for leave to intervene.

It is suggested, at page 74 of appellants' brief, that the trial judge did not exercise its discretion in denying the motions to intervene, and reference is made to the transcript, at pp. 92, et seq. It was contended by appellee that the motions to intervene should be denied because they did not fall within the limitations of Equity Rule No. 37, prescribing that the intervention shall be in recognition of the propriety of the main proceeding. The provisions of the rule, including that part of it which vests discretion in the court for consideration of the question, were squarely before the court.

True, the court, in discussing the matter from the bench with the attorneys prior to its ruling, mentioned the subject of jurisdiction, but this related to the jurisdiction of the United States District Court for the District of Oregon to hear and determine a controversy respecting real property, which the applicant for intervention alleged was situate within the State of Washington. In this same connection the Court discussed the jurisdictional powers of the United States District Court for the District of Oregon to determine a boun-

dary dispute between states, and stated that questions of that character must look for solution to the United States Supreme Court in the exercise of its original jurisdiction.

But it is not a fair construction of the language of the court to say that the court did not exercise its discretion in overruling the motions to intervene. The court, at the time of its decision, did not give the basis for its decision on the motions, nor was one required. But from the fact that the ruling was made under Equity Rule No. 37, which is founded in its application upon a broad discretion vested in the court, it must be inferred that the court did exercise its discretion. It is sufficient answer to the suggestion to note that in the opinion of the court it is expressly noted that the court did exercise its discretion. Said Judge Cavanah in his opinion:

> "After considering these principles applicable to the application to intervene and the contention of the defendants under the circumstances disclosed by the record, the Court is of the opinion that *it did not abuse its discretion in denying intervention, which the courts hold it has in denying intervention or requiring the bringing in of the States.*" (Tr. 45, 46.)

ARGUMENT

Point IV

Neither the State of Oregon nor the State of Washington is an indispensable party to this suit.

(a)

Affirmative discussion of the subject.

The suggestion that the States of Washington and Oregon, or either of them, are indispensable parties, assumes the fact to be that the States, respectively, have asserted timely and genuine claims of ownership. To this proposition we contend that (a) neither of the States has asserted claims of ownership, and (b) under an assumption that such claims have been asserted, the States are not indispensable parties.

Elsewhere in this brief is contained an analysis of the record in respect to the alleged claims made by the States. (pp. 14 to 22, Incl.)

We now endeavor to show by an entire legion of authorities that under an assumption that the States, respectively, do assert a claim of title, the rule is that they are, nevertheless, not indispensable parties.

Before going into the decided cases, it is worthy of remark that the question of whether the State of Oregon owns or claims an interest in the premises is not within the issues raised by the pleadings. Appellants' sole theory, under the pleadings, is that the properties are part of Peacock Spit, within the State of Washington.

Attention is first directed to several elemental propositions. The United States District Court for the District of Oregon could not enter a decree binding upon the State of Washington in respect to land situate

in that State. The State of Washington may not by its consent vest jurisdiction in the Oregon court for the purpose of adjudicating the title to land situate in the State of Washington. The entire claim of the Attorney General and appellants is based upon the proposition that the disputed area of sands is situate within the State of Washington. By the operation of the statute prescribing and limiting the jurisdiction of federal district courts, by the operation of Equity Rule 39, and by virtue of Sec. 111, of Title 28, U. S. C. A., the State of Washington can not be prejudiced by such decree as may be entered by this court, and by no form of process may said State be brought within the jurisdiction of this court for purpose of the adjudication.

Equity Rule No. 39 provides as follows:

"ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES. In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of absent parties."

Section 111 of Title 28, U. S. C. A., provides:

"WHEN PART OF SEVERAL DEFENDANTS CAN NOT BE SERVED. When there are several defendants in any suit at law or in

> equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

This question has been many times before the courts and attention is directed to a few of the cases upon which to define the principles in their application to the particular facts.

In the case of *Williams vs. United States,* 138 U.S. 514, 516, it appeared that the United States granted to the State of Nevada two million acres of land in said State in lieu of certain sections which had theretofore been granted the United States by said State. In the Act which constituted the conveyance to the State, it was provided that the state authorities of Nevada should select for the purposes of the grant any unappropriated, non-mineral public land in said State, in quantities not less than the smallest legal subdivision. Upon such selection, it was provided that the said property should be certified to said State by the Commissioner of the General Land Office. Certain of the lands were duly certified to the State under the Act, and thereupon Williams, the appellant, applied to the

proper officers to purchase one of the said tracts. Pursuant to the application, a contract was entered into between the State and the appellant for the sale to him of the lands in controversy; he, at the time, paying one-fifth of the purchase money and contracting to pay the balance in subsequent annual instalments. Shortly thereafter the United States instituted the present suit in the Circuit Court for the District of Nevada against Williams alone. It was alleged in the bill that the lands were improperly certified to the State; that in equity it had no title, and its contract with the appellant transferred nothing to him. The prayer was for cancellation of the contract between the appellant and the State of Nevada, and an adjudication that the appellant had no title or interest in such lands. *Appellant took the position that the suit could not be maintained because the State of Nevada was an indispensable party, it holding the legal title, and that said State had not been joined.* To this contention, which appears quite identical with the one here, the court expressed itself as follows:

> "It cannot be doubted that the certification operated to transfer the legal title to the State, *Frasher vs. O'Connor,* 115 U. S. 102, nor that the contract between the State and appellant passed to him the equitable title, the legal title being retained by the State, simply as security for the unpaid part of the purchase money. The proposition, therefore, is that where there are outstanding two interests or titles, held by different parties, the real owner cannot proceed against either without joining the other; that only one action can be maintained to divest these parties of their separate

titles; and that to that action both adverse holders must be parties. The proposition is not sound. A court of equity has jurisdiction to divest either one of the adverse holders of his title, in a separate action. Doubtless the court has power, when a separate action is instituted against one, to require that the other party be brought into the suit, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title in one action; but such right does not oust the court of jurisdiction of the separate action against either. It has jurisdiction of separate actions against each of the adverse holders, and there is no legal compulsion, as a matter of jurisdictional necessity, to the joinder of both parties as defendants in one action. There are special reasons why this rule should be recognized in this case. It may be that the Circuit Court would not have jurisdiction of an action against the State; that an action against a State, on behalf of the United States, can be maintainable only in this court; and that when brought in this court no other party than the State can be made defendant. We do not decide that these things are so, but suggest the difficulty which must have presented itself to the counsel for the government and which justifies a separate suit against the holder of the equitable title. The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged

> wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government. The jurisdiction of the Circuit Court over this bill was properly sustained."

The following observation made by the court in the Williams case, supra, in explanation of one of the bases for retaining jurisdiction, is of peculiar interest here. The court said:

> "It may be . . . that an action against a State on behalf of the United States can be maintainable only in this court; *and that when brought in this court no other party than a state can be made defendant.*"

It has since been established in several cases of the Supreme Court that the United States may not invoke the original jurisdiction of the court by joining the appellant packing companies and the respective states. That is made abundantly clear in the case of *California vs. Southern Pacific*, from which appellants have quoted at great length in their brief. The court expressly holds in that case that the United States Supreme Court does not have original jurisdiction of a suit between a state on the one side and citizens of another state and citizens of the same state on the other side. And the United States stands in the same position as a state in the application of the rule. See Hughes Federal Practice, Vol. 5, Sec. 3045, pp. 226, 227. The United States is regarded as a "sister state" and falls within

the same category as a state. See *United States vs. Minnesota*, (1926) 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539.

In the instant suit the United States is seeking injunctive relief against the packing companies, and they are, under any construction of the facts, the primary parties and the ones who have been engaged in the alleged trespassing. One is an Oregon corporation, the other a Washington corporation. It thus appears beyond permissible controversy that the United States District Court for the District of Oregon affords appellee the only tribunal before which it may seek relief from the injustice of such trespasses. That was one of the reasons why the Supreme Court in the Williams case, supra, retained jurisdiction, and held the state not to be an indispensable party.

A leading case upon the subject of inquiry is that of *United States vs. Lee,* 106 U. S. 196, 1 Sup. Ct. 240. In that case one Lee sued parties named Kaufman and Strong to recover a tract of real estate which was held by the defendants under orders from the Secretary of War of the United States. The Attorney General of the United States, without submitting the government to the jurisdiction of the court, filed a document setting up the fact that the property in question was held, occupied and possessed by the United States for governmental purposes and that the defendants were without personal interest, but were simply holding for and in behalf of the United States. It was contended that by reason of that fact the United States was an indispen-

sable party and that the action should be dismissed. The contention was declared unsound and judgment was given against the defendants as individuals. The principle involved was whether the United States, through the claim entered in the proceeding by the Attorney General claiming the property in behalf of the United States, ousted the court of jurisdiction to proceed with the parties before it. The court answered in the negative, stating:

> "That the proposition that, when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession can not be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it."

Apropos of this subject is the statement of Chief Justice Marshall, in the case of *United States vs. Peters,* 9 U. S. (5 Cranch) 115, 139, in which he declared in behalf of the court:

> "It certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title."

The above decision of this court is peculiarly applicable here, because, admittedly, the appellee could not have subjected either of the states to the process of the United States District Court for the District of Oregon. Nor would the said states have been proper parties because neither had been guilty of the trespasses com-

plained of. Nor was the government aware that either of the states was claiming title to the premises when the suit was filed, or at a later date.

This court recently had occasion to consider this question in its related aspects in the case of *Rose vs. Saunders, et al.; same vs. Calaveras Water Users Assn.*, 69 F. (2) 339 (Feb. 28, 1934). That was a suit in the nature of an action to quiet title by a plaintiff who claimed to be a tenant in common, owning an undivided one-half interest in all of the property described in the complaint. The properties consisted of certain water rights in a stream, four reservoirs, tunnels, ditches, conduits, a hydro-electric power plant, and a municipal distributing plant in the city of Angeles, county of Calaveras. It was alleged that the other undivided one-half interest in the property was owned by the Hobart Estate Company, a California corporation, *and that this co-owner was in peaceable possession and control of the property.* It was alleged that the defendants claimed title adversely to plaintiff and that the exact nature of the claim was unknown. The defendants moved to dismiss the bill on the ground that the Hobart Estate Company, the occupant of the premises and co-tenant, was an indispensable party plaintiff, consequently no diversity of citizenship existed between the necessary plaintiffs and the defendants; therefore, that the bill should be dismissed for nonjoinder of an indispensable party, to-wit: the Hobart Estate Company. The District Court dismissed the bill and the Circuit Court of Appeals for the Ninth Circuit

reversed the decision of the District Court. We quote from the opinion, at page 340:

> "It is contended that he is a tenant in common with others, and ought not be permitted to sue in equity, without making his co-tenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy of the court. . . . In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, *as, if such party be a resident of some other state,* ought not prevent a decree upon its merits. It would be a misapplication of the rule, to dismiss the plaintiff's bill, because he has not done that which the law will not enable him to do."

And at page 342:

> "We conclude that the appellant's co-tenant is not an indispensable party to this action where the only rights involved are her rights asserted against a third person who is made defendant in the action. The cause of action stated in the complaint is neither more nor less than a suit to quiet title which it is conceded may be brought without joining the co-tenant. The request for an injunction and the allegations of the complaint that the property in question is utilized by the co-tenants as a public utility do not change the character of the action."

In the case just cited this court quoted with approval the case of *Payne vs. Hook*, 7 Wall (74 U. S.) 425, 431; 19 L. Ed. 260. In that case it was held that one distributee of an estate need not join the other dis-

tributees in a suit by the first mentioned distributee against the administrator to obtain her distributive share in the estate and to cancel a receipt given by the plaintiff to the administrator. We quote from the Hook case and the opinion of this court in the Rose case, supra:

> "But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject matter of the suit should be made parties to it; but this rule, like all general rules being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, *equally interested in the litigation*, but who cannot *conveniently* be made parties to the suit."

The court's attention is next directed to the case of *Williams vs. Crabb,* 117 F. 193 (CCA 7, 1902); certiorari denied 187 U. S. 645, wherein it was held that one of two heirs could bring an action to set aside the will and deed executed by the testator and to recover his interest in the estate without joining the other heir, where to join her would oust the court's jurisdiction.

The case of *O'Connor vs. Slaker,* 22 F. (2) 147 (8th), bears precisely upon the question here before the court as to whether or not the states are indispensable parties to the suit. In this case it was contended that plaintiffs were entitled to the estate of one John

O'Connor, deceased, by virtue of a will bequeathing the same to one Charles O'Connor and, in the case of his death, to his heirs; that he died intestate and that they were his heirs at law. It was alleged that one Slaker, defendant and administrator de bonis non of the estate, was in possession of the property described in the petition. Among other things the prayer asked that the *title be quieted to the real estate as against the administrator and the State of Nebraska,* which said state was claiming the estate upon the ground that there was a failure of heirs of the devisee. The claim of the State of Nebraska was conceded. We quote from the opinion of the court, p. 153:

> "The State also takes the position that while it can not be made a party to this suit in the Federal Court, it is an indispensable party and hence the case can not proceed but should be dismissed, not only as to it but as to the other appelle. The result of sustaining such position would be to force appellants to try in the state court an issue which we hold is cognizable in equity in the federal court. Of course, it is equitable doctrine not to determine a suit without presence of the parties really affected by the decree. *Minnesota vs. Northren Securities Company,* 184 U. S. 199, 12 Supreme Court 308, 46 L. Ed. 499. It is also well settled that a state is not a citizen under the judiciary acts of the United States relating to suits by citizens of different states (citing cases). We are not convinced, however, that the State of Nebraska is an indispensable party to this action. It has no title whatever in the property claimed by appellants, *if they are in fact the heirs at law of John O'Connor. No title vests in the State unless there is failure of heirs. The question of heirship can be deter-*

mined in a federal court without the presence of the State as a party, and it is for the State to determine whether it will interplead and try that question there or risk whatever the effect might be of a decision of the said federal court on this question in an action between appellants and the other appellee. The dismissal of the case as to appellee, the State of Nebraska . . . was not erroneous."

(b)

Cases in support of Appellants' contention discussed.

The main case relied upon by appellants in support of the contention that the states, respectively, are indispensable parties, is that of *California vs. Southern Pacific Company,* 157 U. S. 229, 39 L. Ed. 383. The case does not appear to be in conflict with the cases heretofore discussed on this subject. That was a case in which the Supreme Court was exercising original jurisdiction and a decree of that court in exercising such an "exceptional" jurisdiction would have in effect been quite conclusively binding upon parties not before the court.

At page 257 of the opinion the court held:

"We have no hesitation in holding that *when an original cause is pending in this court, to be disposed of in the first instance* and in the exercise *of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined,* even though they might not be techni-

> cally bound in subsequent litigation in some other tribunal."

Thus the court explicitly based its ruling upon the sanctity and finality which would be accorded its own decree, and thereby, and by direct implication excepts the ruling from its application to other courts.

In subsequent citations of this case, the United States Supreme Court takes pains to point out that the holding is based upon the practical conclusiveness such a decree would have and expressly limits its ruling to its own exceptional jurisdiction. *Texas vs. Interstate Commerce Commission,* 258 U. S. 158, 163; *Penna. vs. W. Virginia,* 262 U. S. 553, 617.

Nor are the facts of that case correlative with those here at issue. Following the rendition of the decree in favor of appellee in the instant case, the respective states will stand in the identical positions occupied by them before the decree should be entered. None of the rights or remedies previously held by such states will be impinged upon or disparaged. It is not a correct statement of fact to say that the United States Supreme Court gives oracular effect to the decisions of courts of limited jurisdiction. Since the United States Supreme Court has repeatedly ruled upon the precise question here at issue, as we have already endeavored to show, it is submitted that the case is not helpful.

The case of *New Mexico vs. Lane, et al.,* 243 U. S. 52, 61 L. Ed. 588, cited at page 46 of appellants' brief, expresses the undoubted rule, but the rule fails of ap-

plication here. There the suit was one in effect against the United States and the United States had not consented to be sued. The plaintiff had laid hold of the wrong party. Obviously, if the suit in fact and in effect was one against the United States, as the court found, then the United States would be an indispensable party, and the suit was dismissed accordingly.

The case of *Chicago, M., St. P. & P. Railroad Company vs. Adams County,* 72 F. (2) 816, cited on page 40 of appellants' brief, is not helpful in considering this question. In that case certain railroad companies sought to invalidate tax assessments which had been made upon properties of plaintiffs, situate in various counties of the State of Washington. The counties as such were the sole defendants. The question presented by the case was whether the county treasurers of the defendant counties were indispensable parties to the suit. In deciding the question the court first stated the universally accepted general definition of "indispensable parties" without any reference to the universally recognized exceptions thereto. The court thereupon proceeded to an analysis of the statutes of the State of Washington to determine the part played by the county treasurers in the collection and assessment of taxes, thus to determine whether or not such county treasurers were indispensable parties. We quote from page 820 of the decision:

> "It will be seen from the foregoing that the active agents in collecting taxes are the boards of county commissioners and the county treasurers.

Furthermore, the county treasurers are repeatedly and specifically designated, by the Washington statutes, as *the collectors of state, county, and other taxes.* Thus, section 83 of the chapter above referred to provides: 'The county treasurer shall be the receiver and collector of all taxes extended upon the tax rolls of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county.'

"Again, in section 84 we find '* * * And from and after the taking effect of this act the county treasurer shall be the sole collector of all delinquent taxes and all other taxes due and collectible on the tax lists of the county.'

"Similar provisions, emphasizing the treasurer's *tax-collecting* duties with even greater particularity, are to be found in Remington's Compiled Statutes of Washington, 1922. Thus, the county treasurer is exofficio treasurer for the pest districts in his county, and the taxes for such districts are to 'be collected and accounted for the same as other taxes are.' Section 2805. The county treasurers shall collect the taxes for diking and drainage districts (section 4382); school districts (section 4867); irrigation districts (section 7453); port districts (section 9693); public waterway districts (section 9811); state, county, school, bridge, road, municipal, and other taxes (section 11252); taxes for cities of first class (section 11321) and cities of the second, third, and fourth classes (sections 11330 and 11334); townships (section 11454); and road districts (section 11482).

"Such an impressive array of statutes clearly indicates that the Legislature of Washington intended that the county treasurers should be indissolubly linked with the tax-collecting machinery

> of the state. That being so, we are convinced that in a suit such as this, in which tax collecting is sought to be restrained, the county treasurers are indispensable parties."

The case rests upon the same foundation of reasoning as that of *New Mexico vs. Lane* and expresses the undoubted law applicable in such cases.

Skeen vs. Lynch, 48 F. (2) 1044, is cited at page 47 of appellants' brief in support of the proposition that the State of Washington is an indispensable party to this suit. The facts of that case are discussed at pages 47 and 48 of appellants' brief. The court could not do otherwise in the Skeen case than to hold that the United States was an indispensable party. We quote from the opinion, at page 1046:

> "We accept the assumed fact as irrefutable. The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us no room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stockraising and agricultural purpose from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States. In that respect the case is well within the rule announced in *Work vs. Braffet*, 276 U. S. 560, 566, 48 S. Ct. 363, 72 L. Ed. 700; * * *
>
> "Appellant relies on the rule that general words may be restrained by particular words—ejusem generis—to sustain the first count. The functions and limitations of that rule are stated in *Danciger vs. Cooley*, 248 U. S. 319, 326, 39 S.

Ct. 119, 63 L. Ed. 266; *Cutler vs. Kouns,* 110 U. S. 720, 728, 4 S. Ct. 274, 28 L. Ed. 305; *Mason vs. United States,* 260 U. S. 545, 554, 43 S. Ct. 200, 67 L. Ed. 396; and *Webber vs. Chicago,* 148 Ill. 313, 36 N. E. 70. But again, immediately following the mineral reservation clause in said act (section 9) is this: 'The coal and other mineral deposits in such lands shall be subject to disposal by the United Sattes in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.' We can conceive of no reason or purpose for including in that sentence the words 'and other mineral' and 'and mineral' had it been the intention to reserve only coal and the like,—noscitur a sociis. Had that been the purpose the sentence would have appropriately read: The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal. In our opinion all mineral in the 640 acres was reserved to the United States."

After thus ruling affirmatively that the oil and gas properties in dispute were the property of the United States, the court was bound to hold the United States to be an indispensable party. Certainly the court, upon deciding the fact to be that the United States was the owner, would not proceed to an adjudication respecting the property in the absence of such actual owner. The case stands upon the same logical base as *New Mexico vs. Lane,* supra.

If this court should decide upon the record before it that the disputed area of sands is situate within the State of Washington and that it is the property of said state, then the State of Washington would admittedly

be an indispensable pary. Without such a preliminary holding, *Skeen vs. Lynch* would not serve as authority for the proposition that the State of Washington is an indispensable party.

The case of *United States vs. Ladley,* 51 F. (2) 756, is discussed in appellants' brief, beginning at page 52. The case is not authority for the proposition that the states respectively are indispensable parties. In that case the court answered two questions. We quote from the opinion, page 756:

> "The only questions to be determined at this time are (1) whether the state should be permitted to intervene, and (2) if so, would the court lose jurisdiction of the case after the state becomes a party."

We are not at this time concerned with the second question. That is considered and discussed, beginning at page 43 of this brief.

In passing upon the first question—that is, whether the state should be permitted to intervene—the court construed Equity Rule No. 37, which relates to the circumstances under which intervention will be permitted, and ruled that the State of Idaho was a proper party and held:

> "*The court may under that rule* (37) *in its discretion proceed without making such persons parties* and the decree will not prejudice the rights of the absent parties."

The court simply exercised a discretion afforded by Rule 37 and expressly excepted its ruling from the ap-

plication of Rule 39, which applies to the subject of indispensable parties. The case is cited in the brief of appellants for the proposition that the State of Idaho was in that case held to be an indispensable party. It is submitted that it was not so held and that the court expressly limited its ruling to the application of Rule 37 on the subject of intervention.

The Ladley case has been discussed in some detail in its application to the questions concerning the attempt made by the Attorneys General to intervene.

ARGUMENT

Point V

The shift in the North Ship Channel, between the years 1929 *and* 1934, *did not constitute an avulsion.*

Numerous maps of Sand Island and vicinity, comprising Plaintiff's Exhibit No. 1, show that the North Ship Channel is alive and active and that it has maintained approximately the same general location since the year 1880. The Supreme Court recognized in its decisions in *Washington vs. Oregon,* 211 U. S. 127, and *Washington vs. Oregon,* 214 U. S. 205, 215, the vagaries of movement peculiar to Sand Island and sand bodies which are predisposed to form in the estuary of the Columbia. The Court prescribes two distinct indices or formulae for location of the line of the channel:

(1) The line may be located by tracing the thread of the channel as the same has varied by the processes of accretion;

(2) The line may be located by determining the thread of the channel as the same has varied by reason of changes wrought through the construction of jetties out into the river.

In this connection the Court uses the following language (214 U. S. 215):

> "So whatever changes have come in the North Ship Channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion or, perhaps, also of late years from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel."

It is submitted that three theories may be advanced to account for the variation in the line of the channel; i. e., accretion, changes wrought through the construction of the dikes, and avulsion.

(1) As to the matter of accretion, it is urged that the change in the line of the channel was brought about through the normal processes of accretion. Beginning with the year 1928, down to and including the year 1934 (see maps for these years — Plaintiff's Exhibit No. 1), it will be noted that the North Ship Channel began to diminish in width and depth until the final union of the sands was consummated in 1934. This was brought about apparently by the gradual deposit of particles of sand upon the banks of the channel through the flux of the tides and the action of the storms. It was a gradual and imperceptible process from month

to month, but noticeable as to the quantum of change from year to year. This, we submit, is accretion.

(2) If the change of the channel in the manner above detailed was wrought by the jetty construction, then the change in the line of the channel was expressly covered by the ruling of the court.

(3) By no possible stretch of definition can the change in the channel's course over a period of approximately six full years be termed an "avulsion."

ARGUMENT

Point VI

THE UNITED STATES IS THE OWNER IN FEE SIMPLE OF SAND ISLAND AND THE TIDE-FLATS WHICH FORM ITS SOUTHERN SHORES

(a)

General Statement of Contentions Advanced by Appellants and Respondents in Support of Their Respective Claims.

The appellants support their claim to right of occupancy of the premises upon the theory that they hold a lease of the same from the State of Washington, that the properties are situate within said State, and that said State is the owner thereof. The claim is predicated upon two fundamental assumptions: (1) That the properties here in dispute are identifiable as a part of that

body of land known as Peacock Spit, which is admittedly within the State of Washington, and (2) That this body maintained its identity and by a process of accretion grew northerly and easterly to form a juncture with Sand Island.

Appellee contends that this body of sand lying along the southerly shores of Sand Island is an indivisible part of Sand Island and the property of the United States. This claim of ownership is predicated upon three distinct theories, to-wit: (1) That the area of sands is not identifiable as a part of Peacock Spit, (2) That the same has become attached to Sand Island by a slow and imperceptible process of accretion and reliction, thereby to form a part of Sand Island, which is admittedly within the the State of Oregon, and (3) That by virtue of its grant from the State of Oregon appellee's title extends to the low water mark of Sand Island, which line extends along the southerly edge of the sands here in dispute.

(b)

The Question Poised

It is by all admitted that Sand Island is a stable and permanent body of land which has maintained its present approximate location since about the year 1885. Its high water mark has not been substantially changed since the year 1900, when the body of sands known as Republic Spit formed the union with the Island under circumstances quite identical with those now before

the court. It is maintained by the United States as a military reservation and the maps show it to be strategically located in the estuary of the Columbia River for defense of the channel across the bar leading into the Pacific Ocean. It is unfortified at the present time. The Island has been used by the United States as a base for dike construction to facilitate the maintenance of a proper channel in the Columbia River. Its shores have been used for generations as fishing sites, and the record discloses that the United States has collected rentals of approximately $600,000 for the use of the fishing sites situate along its southerly shores. Annual rentals of as high as $46,000 have been collected from appellants herein. The property is immensely valuable in both its national defense and commercial aspects.

The permanence of Sand Island and its general physical attributes stand in conspicuous contrast to the area of sands over which this dispute hinges. No controversy exists between the parties with respect to the character of said body of sands prior to its union with Sand Island. It first began its meandering about in the estuary of the Columbia River during the years 1929 and 1930. The maps only partially depict its course between the years 1930 and 1934. During that period they were built up and torn down intermittently and constantly, with new bars forming overnight and old bars being washed out. In the course of a six-months period the channels, cutting and shifting easterly and westerly across the area, have been known to change as much as a thousand feet. Single storms would effect

a change and shifting in the channel or channels and of the bars of several hundred feet. But in the face of this unremitting assault of the waves, currents, winds and tides, the body of sands did maintain something of an entity. Between 1932 and 1934 it is observed that the body diminished in area between 40% and 50%, and at that time the union was formed with Sand Island.

With the properties thus projected by an undisputed record, this court is called upon to say whether a permanent and fixed island may for all practical purposes be destroyed in its utility and value by the appendage of a small, narrow, fleeting and transient body of sands which has been thrown up and against its riparian shores. The fishing sites upon Sand Island are admittedly all located upon and within the area here in dispute, and upon favorable acceptance of appellants' contention, Sand Island, both as an accessory to the national defense and in its commercial aspects, would be quite completely destroyed.

Before going into the law, which we shall endeavor to show is well established in respect to the question, we suggest at the outset that the contention made by appellants is a shocking one. If such a rule should be established, property rights bordering upon the estuary of the Columbia River would be immediately unsettled. The unquestioned policy of the law towards stabilization of titles to real estate would be defeated if such a fickle and fleeting body, traveling willy nilly in the stream, should be permitted to cut off and destroy

permanent and vested property interests.

(c)

Discussion of Cases Cited by Appellants

The Oregon cases cited in the brief of appellants establish several well-recognized principles which we readily concede. There is no contention over the ownership by the State of Oregon of the bed of the stream. It is also true that the statutes of Oregon and the decisions of the Oregon courts and those of Washington have recognized tide and overflow flats as having certain attributes of property and that the same are under stated circumstances capable of alienation. Such tide flats may receive the benefit of accretion under stated circumstances. Recognition has been paid such bodies of sands where the same have had a substantial measure of permanency and where their essential identity has been preserved. But in the Oregon cases mentioned in appellants' brief establishing the above propositions, nothing to parallel our present question may be found save in the case of *State vs. Imlah,* wherein a question similar in many respects to the one here before the court was determined adversely to appellants' contention. The case will be discussed at some length herein upon an affirmative treatment of the subject.

Tide flats or sand bars are not "islands" and are not accorded legal significance as such. Appellants have assumed that because tide flats of measureable permanence have been recognized for some purposes as

having certain incidents of property and of ownership; they have therefore assumed the dignity of "islands." The decisions, as the lower court has construed them and as we now contend, have not so held. The courts have recognized such properties for what they are and nothing more. They have been given a specialized significance; they have been styled at times as "islands" but then only in the colloquial sense. We proceed to an analysis of the cases cited by appellants to establish the proposition which we concede — that is, that the owner of an island is entitled to lands added thereto by accretion to the same extent as the owner of land on the shore of the mainland.

Holman vs. Hodges is apparently the leading case relied upon (appellants' brief, pp. 103, et seq.). In that case the court took great pains to define the permanent character of the island there involved, and described in some detail the various incidents which combined to make it an "island" within the accepted definition. We quote from the decision:

> "The plaintiffs have been owners of Lots Three and Four, bordering the Missouri River, since 1862. A bar began to form opposite these, near the middle of the stream, in 1857. The following year a steamboat ran aground on the bar and for several years afterwards boats were compelled to avoid it by following the current on either side. As early as 1861, according to one of the plaintiffs, it was a half mile wide and has been added to until it is now two or three miles long. By 1870 the northern part was overgrown with willows, and, though the main current of the river had gradually

changed to the west of the bar or island, that part on the east was still fifteen or twenty rods wide, with a distinct current. Since then, willow and cottonwood trees have sprung up on the bar. A small part was cultivated in 1878 and it has been occupied for agricultural purposes since 1886. During all these years alluvial deposits have been added to the north, south and west. In 1870 alluvial deposits began to form on plaintiffs' lots and this has been going on ever since. The water, at ordinary stage, continued to flow between plaintiffs' land and the island until about 1887, and it has run through a well-defined channel during the spring and * * * of the river up to the present time. Without setting out the evidence in detail, it is enough to say that the formation of the bar, or island, has been entirely distinct from any accretion to the shore. It arose near the middle of the river, though probably east of the thread of the then main current, without any connection with the Iowa shore, and has been gradually added to by accretion or reliction until the island *of the proportions mentioned* was formed."

The court there was dealing definitely with an island of substantial and permanent character. The island in that case did not go wandering off in the channel of the stream. It was built up under a normal process of accretion and maintained a permanent base. The ruling is clearly sound, considered in the light of the particular facts.

The same situation is found in the case of *Bouchard vs Abramson*, cited in appellants' brief at p. 82, 118 Pac. 233, 160 Cal. 792. In that case the island had existed in the same location since 1866, and was used for

growing crops, grazing cattle, had fences and other permanent fixtures incidental to such operations. Title had long since been recognized as having vested in its claimants. It was an island within the accepted definition of the term, and correlates with the case of *Holman vs. Hodges,* supra.

The case of *Fowler vs. Wood,* mentioned at p. 107 of appellants' brief, is of similar character. In that case the island involved embraced an area of 274.7 acres. It had been dealt with by purchase and descent from the year 1866, and the court noted that twenty-five different parties claimed to be tenants in common of the tract. It was a permanent body of land lying between the sources of the Missouri and Kansas rivers. It was an island within the accepted definition of the term.

The case of *People vs. Warner,* cited by appellants at p. 82 of the brief, is to the same effect. In that case, as in the others, the court referred to an island of permanent and tangible identity and not to a primitive, floating and temperamental formation of the type we are here considering.

The cases above noted are not, we submit, even remotely analagous to the facts of the situation now before the court.

(d)

Affirmative presentation of the rule applicable to the facts

It is thus seen that in all the cases cited by appellants the accretions referred to applied to islands of a substantial and permanent character, where property rights in favor of individuals had long since vested. Here, as the evidence has disclosed, our problem concerns bodies of alluvial deposits which were in a constant state of flux and which were scarcely identifiable from month to month, particularly in the winter time, when storms occurring with frequency would cause drastic changes in the bars and channels.

When confronted with this problem, the courts have used a variety of legal concepts and have adopted divergent forms of reasoning, but always, so far as our research has disclosed, to arrive at a uniform result. The rule, as we shall soon show, traces its roots deep into the common law. It has been formulated in the cases through a variety of attempted encroachments upon the rights of riparian owners of navigable streams. Without exception, so far as we are able to know, the rights of the littoral proprietor have been held inviolable. Whether the obstruction be an alluvial deposit or sand bar; whether it be an accretion extending laterally to the shore line; whether it be a rock shoal in the stream adjacent to the shore or a number of other obstructions, courts and litigants have invariably bowed to the superior claims of the littoral proprietor.

Before going into the decisions of the Oregon courts controlling the question, reference will first be made to the decisions of courts of other jurisdictions,

which serve to illustrate the applications which have been made of the principle here involved.

The case of *McBride vs. Steinweden,* 72 Kans. 508, 83 Pac. 822 (1906), is the one usually cited because of its definition of an island as it is known to the law. That was a case in which a so-called "island," which had formed in the bed of the Mississippi River, had subsequently become attached to the shore of a riparian proprietor because of a shifting in the river channel. The littoral owner claimed the island or bar as an accretion, and the owner's contention was upheld. The definition of an island is contained at p. 824 of the decision, from which we quote:

> "It is complained of the instructions and especially as to the one which defined an island. Among other things, the Court said:
>
> " 'It may be stated by way of definition that to constitute an island in a river the same must be of a permanent character, not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river and not a sand bar subject to overflow by rise in the river and connected with the land when the water is low.' In the same connection, the jury were told that in considering whether an island in fact existed, or whether the land in controversy was accreted to plaintiff's land, it might consider the character and extent of the claimed accretion, the character of timber growth, the relative size and permanence of channels, if any, around the claimed island, as compared with the size of the stream, the topography of the land in controversy, the character of the soil, the growth, if any, of trees or timber, the testimony of the witnesses, and in fact

all the circumstances as developed by the testimony. Whether the formation in the river was a sand bar or an island was a question of fact and it was fairly presented to the jury. It would depend upon the stability of the soil and the size and permanence of the channels around it. *Railroad v. Shumeier*, 7 Wall (U. S. 286, 19 L. Ed. 74); *Shoemaker vs. Hatch*, 13 Nev. 261; Gould on Waters, (3d Ed.) par. 166.

"As the Court told the jury, account should be taken of the conditions named and also of a variety of circumstances as to the physical features of the formation; the growth upon it, and whether the water supposed to separate it from the shoreland was there in times of high water only, or during the ordinary stage of water in the river."

In the above case the court unequivocally recognized that an alluvial deposit which had not attained the eminence of an island could become attached to the shore lands as an accretion.

Another case is that of *Cyrus Webber vs. J. A. Axtell,* 94 Minn. 375, 102 N. W. 915. That case involved an inland body of water which was a navigable lake, and a shore owner acquired from the United States four meandered lots. Fifteen rods from these lots, between the same and the center of the lake, was an "island," (quotations ours) which was not surveyed or reserved to the Government when the patent was issued. Several years afterwards other parties caused the island to be surveyed and obtained a patent therefor from the United States. A controversy arose between the claimants under the two patents for possession of the property, which was litigated in this suit.

At the time it was commenced accretions had established a sand bar between the so-called island and the property of the shore owner. It was held that the riparian rights of the first patentee vested in him a contingent interest in all relictions and accretions by change of water line, which included the island in question, at the date of the patent from the Government. It was further held that the first patentee could not be deprived by the later patentee of such vested interest.

The Court's attention is further directed to the case of *King vs. Young,* 76 Maine 76, 49 A. Reps. 596. The controversy in this case arose over the ownership of a mussel bed situate in a navigable stream. Contention was made that the mussel bed was an island and that its extension by accretion to the shore of the mainland did not constitute the mussel bed an accretion to the shore or mainland. In enunciating the rule, the court held:

> "He then contends that the mussel bed is an island if it first commences to form at a distance from the shore and there first shows itself above the surface of the water at ebb tide, leaving sufficient water between it and the shore for boats to pass, although by its continued growth it subsequently extends to and connects with the shore so as to leave no water between it and the shore at ebb tide. In this we think he is wrong. We think a mussel bed over which the water ebbs and flows at ebb tide can not properly be called an island. We think such formations constitute what are called flats; and by virtue of the ordinance 1641-7 belong to the owner of the adjoining land, if within one hundred rods of high water mark or so con-

nected with the shore that no water flows between them and the shore when the tide is out."

The case of *Mulry vs. Norton,* 100 N. U. 424, 3 N. E. 581, a leading case and one frequently cited, is authority for the proposition that the owner in fee of the "bed of the river" or other submerged lands is the owner of any bar, island or dry lands which subsequently may be formed thereon. As we show below, the appellee is the owner of the "bed of the river" on which the deposits here involved were formed. *Mulry vs. Norton* is also authority for the proposition that the right of accretion to an island in the river can not be extended lengthwise of the river in a manner to exclude riparian proprietors above and below such island from access to the river.

Attention is also directed to the case of *Waring vs. Stetcomb,* (Md. 1923) 119 Atl. 336. In that case the lands of the plaintiff and the defendant, both fronting on Chesapeake Bay, were separated by a small stream entering the Bay. Due to a slow shift of the stream into the plainitff's land a bar was gradually added to the defendant's land. This bar extended across the front of the plaintiff's property. In an action to recover this land it was held that the land so formed belonged to the plaintiff, despite the fact that it was separated from the plaintiff's main body of land by the boundary stream, since to hold otherwise would deprive the plaintiff of valuable riparian rights on the Bay.

(e)

The properties here in dispute are the properties of the United States, by virtue of its grant from the State of Oregon

The Act granting Sand Island to the United States provides as follows:

> "AN ACT to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned.
>
> "Section 1. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow, between high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this State; the said island being subject to overflow between high and low tide." (Tr. p. 6.)

The character of a grant of tidelands is defined in the case of *Fellman vs. Tidewater Mill Co.*, 78 Ore. 1; 152 Pac. 268. We quote from the opinion of Mr. Justice Burnett:

> "In the first place, as regards the tide-lands, the deeds conveyed to the grantor of plaintiffs all the tide-land in front of the lots mentioned. This extended the holdings under those deeds to low-water mark, wherever the same might be then or afterward. Applying this principle, Mr. Justice Eakin, in *Grant vs. Oregon Navigation Co.*, 49 *Or.* 324 (90 Pac. 179, 1099), as quoted by Mr. Justice Bean in *Pacific Elevator Co. vs. Portland*, 65 Or. 349, 399 (133 Pac. 72, 82, 46 L. R. A. (N.S) 363), said:

"'By the legislative acts of 1872 * * * and 1874 * * * the upland owner was given the preference right to purchase the tide-land, and upon such purchase, if not already vested in another under Section 4042, B. & C. Comp., he thereby acquired also the exclusive wharfage right to deep water, and also all accretions to his tide-land and the right to fill up the shallows or flats, so long as he does not impede navigation or interfere with commerce over the same.'

"The rule is that the purchaser of tide-land takes to the low-water mark, that *afterward he is entitled to follow that line to the utmost of its recession, and that he aquires title to the accretions* which gradually form upon his original grant."

It is established in the law of the State of Oregon and confirmed by appellants at p. 80 of their brief, that title to the *beds and banks of navigable waters* carries with it title to all *tide lands, tide flats and like formations. Taylor Sands Fishing Co. vs. Benson,* 56 Ore. 157, 108 Pac. 126; *Van Dusen Investment Co. vs. Western Fishing Co.,* 63 Ore. 7, 124 Pac. 677, 126 Pac. 604.

The Supreme Court ruled in the case of *Armstrong vs. Pincas,* 81 Ore. 156, 158 Pac. 662, that land below ordinary high-water mark is properly styled the "bed of the river." We quote from the decision, pp. 159 and 160:

"It may be said that below ordinary high-water mark land is deprived of its usefulness as land by the action of the water remaining upon it so permanently, and becomes what we all know as the bed of the river; *Paine Lbr. Co. vs. U. S.,* (C. C.)

> 55. Fed. 854, 865; *Sun Dial Ranch vs. May Land Co.*, 61 Or. 205, 119 Pac. 758. The beach or shore of our rivers is the actual as well as the nominal bed of the river. Hoch, Rivers, Sec. 7. All is river or river's bed which is contained between the two banks and the high-water line on them, and all is bank or land which embraces the waters in their ordinary full tide. Land in New Orleans, called the Batture, 17 Am. St. Papers, 91."

The grant of the State of Oregon to the United States expressly contained a grant of Sand Island to low-water mark, and thereby conveyed to the United States a portion of the bed of the river, as that term has been defined, supra, and coincidentally the United States became entitled, under the rule of the Taylor Sands and VanDusen cases just cited, to all tide lands, tide flats, and like formations which might form thereon.

The question of interpreting the meaning of low-water mark in its relation to islands or alluvial deposits forming opposite the riparian shores of such a grantee came squarely before the Oregon Supreme Court in the case of *State vs. Imlah*, 135 Ore. 66, 294 Pac. 1046 (1931). In that case the State had granted the fee to Imlah to low-water mark. An island of some sixteen acres formed in the bed of the Willamette River (a navigable stream) opposite Imlah's holding, with navigable channels on either side thereof. Gradually the channel between Imlah's shore and the island shoaled by accretion extending from the shore to the island. The State of Oregon made strenuous contention that

since the island had formed in the bed of the stream the same belonged to the State of Oregon and that the attachment of said island to the riparian shores of the State's grantee did not defeat such ownership. Said Chief Justice Rand in the opinion:

> "The State's principal contention is that the small island first appearing in 1882, or shortly thereafter, somewhere west of the center of the river continued to exist as an island and to become enlarged by the gradual and imperceptible deposit of sand and gravel upon its outer edges, thereby filling up the channel between it and the west bank and extending the island to the mainland, and that the alluvia thus deposited between the two constituted an accretion to the island and not to the mainland as contended for by the defendants and as held by the court below in the decree appealed from. If this contention is sustained by the evidence, the rule unquestionably is that *where an island arise in a stream, the title to the bed of which is in the state, it does not belong to the owner of either shore, but if it is formed upon a portion of the bed which belongs to a riparian owner it becomes his property.* 1 Farnham on Water Rights (1904 Ed.) p. 276 and authorities there cited. . . . Under said grant of the lands lying between high and low-water marks of the Willamette River by the State defendant's lands at all stages of the river were in actual contact with the water and the owners thereof were riparian owners and became entitled to all the rights and privileges of such ownership. This included the right to all accretions which thereafter should become annexed to the shore or river bank upon their respective premises. *There is no evidence whatever by which the low water mark of the river at the time of said grant can be fixed. At present all the premises in*

controversy are attached to the shore or bank of the river and uncovered during mean low water.

"Under these circumstances we think that the rule 'Once a riparian owner always a riparian owner' should be applied. 1 Farnham on Waters and Water Rights, p. 326. As said by Mr. Justice McBride speaking for this court in *Hanson vs. Thornton*, 91 Ore. 585, 179 Pac. 494: 'One who purchases land upon a lake or water course usually considers the right of access to such waters as an element of value in such purchase. When we speak of riparian rights we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a usufruct in the water. *To say that the owner of such a right may without his consent be deprived of it by the state or the general government, permitting some other person to obtain title to the accretion formed by an impounding or diversion of part of the waters that previously washed the shore of his land does not appeal to our sense of justice and we do not believe that the authorities generally support such a doctrine!*"

See also *Shively vs. Bowlby,* affirming the doctrine of *State vs. Imlah,* supra, wherein the court said (152 U. S. 1, 38, 39):

"The question in controversy was whether the plaintiff's patent was limited by the main shore, or extended to the outside of the island. The Supreme Court of Minnesota held that, by the law of Minnesota, land bounded by a navigable river extended to low water mark, *at least, if not to the thread of the river;* and that the plaintiff's title therefore extended to the water's edge at low water mark and included the island, and gave judgment for the plainitff. 10 Minnesota, 82. This court affirmed the judgment, saying: 'Express decision of the

> Supreme Court of the State was, that the river, in this case, and not the meander line, is the west boundary of the lot, and in that conclusion we entirely concur." . . . 7 Wall. 286, 287.

See also *Strandholm vs. Barbey,* 145 Ore. 427, 439; 26 Pac. (2) 46, wherein the contention was made by the defendant, Barbey, in that case—who is the same Barbey now before the court—that he was the lessee of the United States of America, owner of Sand Island, and that as such he possessed a sufficient stake in the island to confer upon him the rights which riparian owners possessed to wharf out *from the shore line to navigable waters.*

It would thus appear that the terms of the Act granting the properties to the United States were broad. The grant was not only of Sand Island, but included "all right and interest of the State of Oregon in and to the land in front of Fort Stevens and Point Adams situate in this state and subject to overflow between high and low tide, etc." Mindful of the purpose for which the grant was made, a construction would not be unwarranted that title was taken to the thread of the stream or to navigable waters under the rule enunciated in the cases above cited.

The former holding of this court in the case of *Columbia River Packers Association vs. United States,* 29 F. (2) 91, would seem to effect the same result. We quote from the opinion:

> "This suit was instituted by the United States and its lessee, against the state land board of the

state of Oregon and its lessee, to establish the right and title of the United States to Sand Island, at the mouth of the Columbia river, *and to the tide and shore lands adjacent thereto. From a decree in favor of the plaintiffs, the defendants have appealed.*

"*Sand Island is within the limits of the state of Oregon, and the adjacent tide and shore lands, up to high-water mark, originally belonged to that state. Washington v. Oregon*, 211 U. S. 127, 29 S. Ct. 47, 53 L. Ed. 118; *Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331.

* * * * *

"After the lapse of nearly 70 years it would seem that a grant such as was made by the state of Oregon in this case should not be open to further controversy, especially in view of the fact that the grantee has asserted and exercised dominion over the granted premises for upwards of 25 years. Nevertheless, the state of Oregon now contends, first, that the grant was for military or naval purposes only; and, second, that the grant has never been accepted by Congress. But the grant itself is absolute in form, wihtout limitation or condition, and it would violate every known rule of statutory construction to ingraft upon it now any such limitation or condition as that contended for by the appellees, *especially in view of the construction the parties themselves have placed upon the grant for so long a period.*"

Thus it is seen that the courts have been very zealous in their protection of the rights of littoral owners on navigable streams. Nor have the Oregon courts wavered in affording such protection. The case of *State vs. Imlah*, supra, has already been considered. In the case of *Moore vs. Willamette Transportation Co.*, 7

Ore. 359, the rule was established that a reef of rocks on the margin of a navigable river belongs to the riparian owner, though there is in ordinary stages of water in the river a channel between this reef and the shore.

Other interesting cases containing exposition of the rule are: *Coquille Mill & Mercantile Co. vs. Johnson*, 52 Ore. 547, 555; 98 Pac. 132; *Weems Steamboat Co. vs. Peoples Steamboat Co.*, 214 U. S. 345, 53 L. Ed. 1028.

We conclude this phase of the discussion by directing attention to the case of *Cook vs. Dabney*, 70 Ore. 529, 139 Pac. 721. That was a suit brought by riparian owners to cancel a deed issued by the State Land Board, purporting to convey a sand bar or island, so-called, in the channel westerly of Swan Island in the Willamette River, a navigable stream, between low water mark and the ship channel. The plaintiffs in the suit insisted that they had a right of access to navigable water, which was in the nature of a franchise or incorporeal hereditament, and annexed to the upland ownership; that the State of Oregon held title to the bed of the river in trust; that it had no power to sell the beds of navigable streams; that the conveyance of the shoal or sand bar to private owners impaired the rights of plaintiffs to wharf out to the navigable ship channel and constituted a cloud upon their title and for that reason should be cancelled.

The evidence showed that the so-called "island" or sand bar was continually changing by the action of

the waters. The court sustained the claim of plaintiff and cancelled the deed formerly given by the State and stated, among other things:

> "The right of access to navigable water abutting upon riparian lands is a valuable appurtenance to such lands, and equity will in good reason give relief against an instrument designed to prejudice the enjoyment of such appurtenances. Such is the doctrine laid down in *Sengstacken vs. McCormick*, 46 Ore. 171, 79 Pac. 412. . . .
>
> "It would seriously unsettle property rights of riparian owners and work great harm to navigation *if it were permitted that the moment low water should disclose a sand bar, that is liable to be carried out by the next flood, one might apply to the State and get a deed in fee simple for such a place and be authoribed to use it as a basis for exactions against the upland owners.*"

CONCLUSION

Not until the appellee cancelled its lease with the appellant packing companies in 1932 was there a suggestion of dissent over the ownership of Sand Island and the sand bars appurtenant thereto. When the Government failed to again offer the fishing sites for lease for the fishing season of 1932 and subsequent years, it was thereupon concluded that the sands adjacent to the Island should be called Peacock Spit and under such a claim possession was taken and the fishing went forward.

Such occupation continued until the Government offered the sites for lease in 1934 and the bid of plain-

tiffs was tendered to the Government, thereby discountenancing the so-called lease of the premises from the State of Washington. But the United States did not accept any bids tendered at that time and the appellants again reverted to the claim under the assumed lease from the State of Washington. This claim was continued until the State of Washington late in the year 1934 declared unlawful the use of drag seines within the State.

With other sources of claim for occupancy of the premises cut off, we next find the appellants applying to the State of Oregon for a lease of the premises under a new theory, to-wit: that the property rightfully belonged to the State of Oregon. Upon this application of appellants a hearing was held, but no action was taken by the State. This is all shown by an uncontroverted record.

The ruthlessness of such action is made to stand out in some relief when it is recalled that in the answer of appellants it was alleged and sworn to that:

> "The premises leased by the State of Washington to defendant Baker's Bay Fish Company as aforesaid, being the identical premises upon which the defendants have carried on the fishing operations described in the original complaint and in the amended complaint herein, are not and never were a part of Sand Island and are not and never were within the State of Oregon.
>
> "*At no time since Oregon was admitted to the Union has it claimed that said premises or any part thereof were within the State of Oregon or*

exercised or claimed the right to exercise any jurisdiction over it." (Tr. pp. 21, 22.)

It might appear as a bit strange to the court that after the case of appellee had been filed for almost a year, the Attorneys General of the two States should within the same week take it into their heads to rush into the court in a last moment attempt to intervene. Perhaps it was by coincidence that the officers of the States decided almost within the hour, so to speak, to rush into the contest. Their interests were diametrically conflicting. We do not suggest that the States acted in bad faith, but the reason for their concerted action is matter for speculation. It is significant that the attempts at intervention thus made have been capitalized by appellants in an effort to prevent consideration of the case upon its merits.

No relief was asked as against either of the States. Neither can be affected by the decree of the court. Neither can be hurt by the decree, because it is not contended that the alleged lease of the State of Washington is practically operative at this time or that it has been operative since drag seining was declared illegal in that state; and a decree of this court will not purport to bind the State of Oregon in any connection.

The suggestion that the States will be without a remedy in the event the within decree is sustained can hardly be considered correct in the face of the thousands of cases now pending throughout the country, in which the United States is being sued with its consent

having been given. In any event, the suggestion is not a proper one. The Supreme Court expressed the thought precisely when it opined, in the case of *United States vs. Lee*, 106 U. S. 241, quoting from the decision of *Gibbons vs. United States*, 8 Wall. 269,:

> *"The supposition that the Government will not pay its debts or will not do justice is not to be indulged."*

The appellee has chosen the only tribunal available to litigate its claim against appellants. As we have shown, it could not have joined the States and the defendant companies to invoke the original jurisdiction of the Supreme Court of the United States. Without a decree upon the merits sustaining the trial court, appellee stands without recourse to protect its properties against the continued maraudings of the appellant companies.

It is respectfully submitted that the decree of the learned and able trial court should be sustained.

Respectfully submitted,

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